ATTORNEY FOR APPELLANT:

THOMAS M. THOMPSON
Connersville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEITH HOSEA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A04-0606-CR-297
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0405-FC-147

January 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Keith Hosea appeals the three-year sentence imposed after his conviction for Class D felony non-support of a dependent child. We affirm.

Issue

The sole restated issue before us is whether the trial court properly sentenced Hosea.

Facts

On May 28, 2004, the State charged Hosea with Class C felony non-support of a dependent, alleging he was in arrears on his support for his three children in the amount of $16,775. On February 20, 2006, the date on which Hosea was to go to trial, he agreed to plead guilty to Class D felony non-support of a dependent. When Hosea pled guilty, he expressly waived his right to have a jury determine aggravating circumstances in sentencing.

On March 15, 2006, the trial court held a sentencing hearing. It later was discovered that the courtroom recording equipment was not operating properly that day and, therefore, no transcript of that hearing can be prepared. The trial court did not complete sentencing on the 15th and continued the hearing to March 24, 2006. The recording equipment was working on that date, and the court stated that it found as aggravating circumstances Hosea's prior criminal history, the fact that he was on probation at the time this crime was committed, and the fact that the support arrearage had continued to increase after his initial arrest in this case. The court also stated that the aggravating circumstances outweighed any mitigating circumstances. It then sentenced

Hosea to a Class D felony maximum term of three years, with one year suspended. Hosea now appeals.

Analysis

At the outset, we observe that Hosea committed and originally was charged with this crime in 2004 but was not convicted and sentenced until 2006. In 2005, the legislature replaced the prior sentencing statutes, which provided a "presumptive" sentence for each class of felony, with new statutes simply providing for an "advisory" sentence. In such a situation, this court has, for the most part, applied the "presumptive" sentencing scheme and the case law developed under it instead of the new "advisory" scheme. See Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied; but see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). Both Hosea and the State here refer to "presumptive" sentences; in the absence of any argument to the contrary, we will assume the "presumptive" scheme governs this case.

When faced with a non-Blakely challenge to a sentence enhanced above the presumptive,[1] the first step is to determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances. Hope v. State, 834 N.E.2d 713, 717-18 (Ind. Ct. App. 2005). If we find an irregularity in a trial court's sentencing decision, we may remand to the trial court for

[1] As noted, Hosea waived his right to have a jury find the existence of aggravating circumstances when he pled guilty.

a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id. at 718. Even if there is no irregularity and the trial court followed the proper procedures in imposing sentence, we still may exercise our authority under Indiana Appellate Rule 7(B) to revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender. Id.

The primary focus of Hosea's argument is that the trial court did not issue a sentencing statement that identified and weighed the significant aggravating and mitigating circumstances. Although the trial court's written sentencing statement did not mention or weigh aggravating and mitigating circumstances, it did make an oral statement on March 24, 2006, in which it did so. In reviewing a sentencing decision in a non-capital case, appellate courts are not limited to the trial court's written sentencing statement but may also consider comments in the transcript of the sentencing proceedings. Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002). Hosea's contention that the trial court failed to issue a sentencing statement is incorrect.

To the extent Hosea claims error in that the beginning of the sentencing hearing on March 15, 2006 was not recorded, that is not a cognizable claim on appeal. An appellant bears the burden of presenting a record that is complete with respect to the issues raised on appeal. Ford v. State, 704 N.E.2d 457, 461 (Ind. 1998). This burden is sustained by submitting a transcript of the trial proceedings or, where no transcript is available, an affidavit setting forward the content of the proceedings. Id. The current procedure for submitting a record of proceedings where no transcript is available is Indiana Appellate

Rule 31. An appellant waives review of a claimed error if there is no transcript available and he or she does not attempt to prepare a statement of evidence under Appellate Rule 31 that is sufficient to permit appellate review of the claimed error. See Farris v. State, 818 N.E.2d 63, 70-71 (Ind. Ct. App. 2004), trans. denied. We conclude Hosea has waived any error with respect to the adequacy of the trial court's sentencing procedures.

Regardless of this waiver, we will address the appropriateness of Hosea's sentence under Appellate Rule 7(B) because such review is not dependent upon the propriety of the trial court's sentencing procedures. See Hope, 834 N.E.2d at 718. Regarding the nature of the offense, the trial court specifically stated that there appeared to be clearly sufficient evidence that Hosea's support arrearage exceeded $15,000, and it had continued to accrue after his arrest in this case. In order to convict Hosea of Class D felony non-support of a dependent child, any amount of arrearage would have been sufficient. See Ind. Code § 35-46-1-5(a). The fact that Hosea had accumulated such a large arrearage, which continued to accrue after his arrest, appropriately goes to the severity of the crime and the proper length of the sentence. See Jones v. State, 812 N.E.2d 820, 826 (Ind. Ct. App. 2004).

Regarding Hosea's character, he has a criminal history, accumulated since 1990, consisting of convictions for leaving the scene of an accident, invasion of privacy, operating a vehicle while intoxicated, battery on a police officer, theft, and neglect of a dependent. He was on probation for the neglect conviction when he committed the current offense. He was found to have violated probation on at least two occasions in the past. Although none of Hosea's previous convictions exceeded a Class D felony in

severity, the sheer number of convictions and failed attempts at probation reflect poorly on his character, particularly with respect to sentencing Hosea for another Class D felony. See Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006), trans. denied (observing that significance of a defendant's criminal history is dependent on the gravity, nature, and number of prior offenses as they relate to the current offense).

Hosea did plead guilty, which often is a significant mitigating circumstance in sentencing. See Francis v. State, 817 N.E.2d 235, 237-38 (Ind. 2004). The significance of this factor will vary from case to case, however. Id. at 238 n.3. Here, Hosea did not plead guilty until nearly two years had passed after he was first charged and not until the morning his trial was to begin. During this period of delay, the amount of the support arrearage increased. Additionally, Hosea was greatly benefited by the plea because he only pled guilty to the Class D felony charge rather than the original Class C felony charge, despite the fact that there seemed to be little dispute that the amount of arrearage exceeded the $15,000 necessary to convict Hosea of the Class C felony. Under these circumstances, Hosea's guilty plea is not entitled to great weight. In sum, we believe that the nature of the offense and Hosea's character both justify an enhancement of his sentence to the maximum of three years for a Class D felony, such that that sentence is not inappropriate.

Conclusion

Despite Hosea's claim to the contrary, the trial court here did issue a sentencing statement explaining its enhancement of his sentence to three years. Additionally, we cannot say that sentence is inappropriate. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.